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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD GRAFFAS LOZANO,

Defendant and Appellant.

E069790

(Super.Ct.No. FWV17000732)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Robert V. Vallandigham, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Joseph C. Anagnos, Deputy Attorneys General, for Plaintiff and Respondent.

## **FACTUAL AND PROCEDURAL HISTORY**

### **A. PROCEDURAL HISTORY**

On February 15, 2017, an information charged defendant and appellant Richard Graffas Lozano with second degree burglary under Penal Code<sup>1</sup> section 211 (count 1). The information also alleged that defendant used a deadly or dangerous weapon, a hammer, under section 12022, subdivision (b)(1). Furthermore, the information alleged that defendant had suffered a prior robbery conviction, which was both (1) a strike prior under sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d); and (2) a prison prior under section 667.5, subdivision (a).

On April 25, 2017, pursuant to a negotiated plea agreement, defendant pled guilty to a new count, grand theft of property exceeding \$950 in value from a person, under section 487, subdivision (c) (count 2). Defendant also admitted the strike prior allegation. Thereafter, the trial court dismissed count 1, as well as four other cases against defendant, and sentenced him to the midterm of two years, doubled to four years, for a total state prison term of four years.

On December 4, 2017, defendant filed a petition to reduce his conviction from a felony to a misdemeanor pursuant to Proposition 47 (§ 1170.18). On December 22, 2017, the trial court found defendant ineligible for relief and denied the petition.

On January 8, 2018, defendant timely filed his notice of appeal.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

**B. FACTUAL BACKGROUND**

The parties stipulated to the following: “Factual basis from police reports, criminal history, judicial notice if necessary, provided none of those documents become part of the face of the record.”

According to the police reports, on February 13, 2017, defendant walked past the registers at a home improvement store; he was holding a box containing a power drill. An employee asked defendant to present his receipt. Defendant presented a hammer and responded, “I don’t need to show you anything. If you touch me, I will jack you.” Fearful of defendant, the employee allowed defendant to leave the store.

A police officer arrested defendant about three blocks away from the store. The officer observed defendant throw the power drill and hammer to the ground. Defendant had also stolen a pack of AAA batteries. Another officer transported the employee to defendant’s location. The employee identified defendant as the person who had taken the drill and threatened him.

**DISCUSSION**

**A. THE TRIAL COURT PROPERLY DENIED DEFENDANT’S  
PROPOSITION 47 PETITION FOR RESENTENCING**

Defendant contends that the trial court erred in denying his petition for resentencing under Proposition 47. The People contend that this appeal should be dismissed because defendant failed to obtain a certificate of probable cause. We need not address the People’s contention because defendant’s appeal fails on the merits.

1. *ADDITIONAL BACKGROUND*

On April 25, 2017, defendant executed a plea form in which he pled no contest to “grand theft of property taken from person [exceeding] \$950” in value, in exchange for the dismissal of a robbery charge and four other cases. Prior to accepting his plea, the trial court discussed the plea form with defendant and confirmed that he had reviewed it with his attorney, understood it, and had no questions about the form. After a thorough discussion with the parties, the court asked defendant: “So in your case, sir, FWV17000732, to the added charge of grand theft, property *more* than \$950, you plead?” (Italics and boldface added.) Defendant responded, “No contest.” The court found that the plea was knowing and voluntary and that it had a factual basis. In accordance with the plea agreement, the court dismissed the remaining charge of second degree burglary, and four other cases.

On December 4, 2017, defendant filed a petition for resentencing under Proposition 47. The petition included a declaration by defendant that he committed only petty theft, because the total value of the items he stole was less than \$950.

At the hearing on defendant’s petition on December 22, 2017, the following exchange occurred:

Defense Counsel: “This is a post November 4, 2014, event, and as such, I believe [defendant] is ineligible for resentencing.

“The Court: He pled to—yeah. Since it was post adoption of Prop 47, it appears that it was the intent of . . . both parties that—it was a reduction from a 211 [second degree burglary] to 487 to allow him to plea to a non-strike offense, but for it to remain a felony and state prison commitment. So based on that, the petition to reduce the matter to a misdemeanor and resentence as a misdemeanor is denied. At this time due to those factors, the defendant [is] ineligible for reduction.”

## 2. ANALYSIS

“Approved by the voters in 2014, Proposition 47 . . . reduced the punishment of certain theft- and drug-related offenses, making them punishable as misdemeanors rather than felonies. To that end, Proposition 47 amended or added several statutory provisions, including new Penal Code section 490.2, which provides that ‘obtaining any property by theft’ is petty theft and is to be punished as a misdemeanor if the value of the property taken is \$950 or less. A separate provision of Proposition 47, codified in Penal Code section 1170.18, subdivision (a), establishes procedures under which a person serving a felony sentence at the time of Proposition 47’s passage may be resentenced to a misdemeanor term if the person ‘would have been guilty of a misdemeanor under [Proposition 47] had this act been in effect at the time of the offense.’ ” (*People v. Page* (2017) 3 Cal.5th 1175, 1179.) “If the petitioner satisfies the criteria in subdivision (a), the petitioner’s felony sentence shall be recalled and the petitioner resentenced to a misdemeanor.” (§ 1170.18, subd. (b).)

In this case, defendant failed to satisfy the criteria in section 1170.18, subdivision (a), which clearly states: “A person who, *on November 5, 2014, was serving a sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (‘this act’) had this act been in effect at the time of the offense* may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing.” (§ 1170.18, subd. (a), italics added.) Here, defendant committed the crime in question on February 13, 2017; defendant pled guilty and was sentenced on April 25, 2017—almost two and a half years *after* the passage of Proposition 47. Therefore, on November 5, 2014, defendant was *not* serving a sentence for his conviction under section 487. As noted above, both defense counsel and the trial court at the hearing on defendant’s Proposition 47 recognized that the felony in question was “post November 4, 2014,” and hence, defendant was “ineligible for resentencing.”

In addition, although Proposition 47 declared that the theft of any property not exceeding \$950 in value shall be considered petty theft and punished as a misdemeanor under section 490.2, subdivision (a), defendant pled no contest to grand theft of property exceeding \$950 in value. Defendant, however, contends that the actual value of the items stolen was less than \$950. Defendant’s argument is without merit: defendant agreed that the value of the property exceeded \$950 in his plea agreement, in exchange for a dismissal of his second degree burglary count and four other cases. Therefore, even if defendant satisfied the criteria in section 1170.18, subdivision (a), defendant has failed to

prove that his theft conviction should be reduced to a misdemeanor under section 490.2 because he agreed that the value of the stolen property exceeded \$950.

Defendant's reliance on *Harris v. Superior Court* (2016) 1 Cal.5th 984 is misplaced. In *Harris*, the defendant hit his victim in the face and took his cell phone. In April of 2013, pursuant to a plea agreement, defendant pled guilty to "grand theft from the person." In exchange, the robbery charge was dismissed. In November of 2014, Proposition 47 was enacted. Thereafter, the defendant petitioned to have his conviction reclassified as a misdemeanor because Proposition 47 "reduced the grand theft offense to a misdemeanor"; the parties agreed that Proposition 47 applied to the defendant. (*Id.* at p. 987-989.) The facts in this case are distinguishable from the facts in *Harris*. In *Harris*, the defendant pled guilty to grand theft from the person, an offense that Proposition 47 reduced to a misdemeanor. (*Id.* at p. 987.) In this case, defendant pled no contest to grand theft of property exceeding \$950 in value from a person, an offense that is not reduced to a misdemeanor under Proposition 47. (§§ 487, subs. (a), (d), 490.2, subd. (a).) Moreover, as discussed above, defendant pled no contest to grand theft *after* the enactment of Proposition 47. Hence, unlike the defendant in *Harris* who was in prison when Proposition 47 was enacted, defendant committed his crime three years *after* the enactment of Proposition 47. Therefore, *Harris* is not applicable to this case.

Based on the foregoing, defendant was not entitled to have his felony conviction for grand theft of property exceeding \$950 in value reduced to a misdemeanor under section 1170.18 because he was not eligible for relief under Proposition 47.

**DISPOSITION**

The judgment is affirmed.

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MILLER

Acting P. J.

We concur:

CODRINGTON

J.

RAPHAEL

J.